

December 12, 2006

*Via Electronic Filing*

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Re: WT Docket Nos. 96-86, 06-150 and 06-169  
*Ex Parte*

Dear Ms. Dortch:

In the 700 MHz proceedings, Access Spectrum, LLC and Pegasus Communications Corporation have proposed a comprehensive approach to optimizing the entire Upper 700 MHz band, described as the Broadband Optimization Plan ("BOP") and the Commercial 700 MHz Plan. The Access Spectrum/Pegasus plan is the only plan proposed in the record that would enhance U.S. broadband development and promote global leadership by maximizing technology options; leverage commercial deployment to lower costs for Public Safety; use all available spectrum efficiently; and enable new broadband entrants. This *ex parte* letter explains the legal framework within which the FCC operates as it decides issues relating to the 700 MHz band,<sup>1</sup> and describes the Commission's ample legal authority to pursue its policy objectives in reconfiguring the 700 MHz band, including implementation of the BOP and the Commercial 700 MHz Plan. This letter first describes the Commission's general authority with respect to managing radio spectrum and the specific statutory directives of the Digital Television Transition and Public Safety Act of 2005 ("DTV Act")<sup>2</sup> and Section 337.<sup>3</sup> The letter then describes the Commission's authority to use certain techniques in managing spectrum for

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<sup>1</sup> See *The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010*, Eighth Notice of Proposed Rulemaking, 21 FCC Rcd 3668 (2006); *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Notice of Proposed Rulemaking, Fourth Notice of Proposed Rulemaking, and Second Further Notice of Proposed Rulemaking, 21 FCC Rcd 9345 (2006) ("*Commercial 700 MHz NPRM*"); *Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules*, Notice of Proposed Rulemaking, 21 FCC Rcd 10413 (2006).

<sup>2</sup> Digital Television Transition and Public Safety Act of 2005, Title III (§§ 3001-3013) of the Deficit Reduction Act of 2005, Pub. L. No. 109-171 (2006) ("DTV Act").

<sup>3</sup> 47 U.S.C. § 337.

the public good, including the use of two-sided auctions and bidding credits or preferences.

## **I. General Authority**

It is well-established that the Commission possesses broad general authority to manage the radio spectrum. Recognizing the dynamic nature of radio communications, Congress opted for an expansive grant of authority to the FCC that generally avoids micromanagement.<sup>4</sup> Where the Commission possesses subject matter jurisdiction (in this case, radio communication, spectrum management, and competitive bidding design), it is afforded broad discretion to promulgate rules bearing upon that realm that do not otherwise conflict with the terms of the Act.<sup>5</sup> Moreover, where, as in the 700 MHz rulemakings, the Commission “is fostering innovative methods of exploiting the spectrum, the Commission ‘functions as a policymaker and, inevitably, a seer – roles in which it will be accorded the greatest deference by a reviewing court.’”<sup>6</sup> The Commission’s broad statutory authority provides it with the flexibility necessary for seizing this exceptional opportunity to enhance the effective utilization of spectrum for both public safety and commercial purposes.

### **A. The Digital Television Transition and Public Safety Act of 2005**

Within the context of the Commission’s broad general statutory authority, specific statutory requirements must guide the Commission in its approach to reconfiguring the 700 MHz band. A review of the relevant statutory provisions, as amended by the DTV Act, demonstrates that implementation of the BOP and Commercial 700 MHz Plan would adhere strictly to these statutory obligations. The DTV Act amended Sections 309(j) and 337 of the Communications Act in order to establish a hard date for clearing the 700

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<sup>4</sup> See *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (“While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency.”).

<sup>5</sup> See 47 U.S.C. §§ 154(i) and 303(r); see also *United States v. Storer Broadcasting*, 351 U.S. 192, 203 (1956) (finding that these provisions “grant general rulemaking power not inconsistent with the Act or law”); see also *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 593-595 (1981) (emphasizing the FCC’s broad discretion in determining how best to achieve the goal of securing the maximum benefits of radio to the people of the United States).

<sup>6</sup> *Teledesic LLC v. Federal Communications Commission*, 275 F.3d 75, 84 (D.C. Cir. 2001) (quoting *Telocator Network of America v. FCC*, 691 F.2d 525, 538 (D.C. Cir. 1982)).

MHz band of analog broadcast television operations and to address a budget need by requiring an auction of the recovered analog spectrum by a date certain. However, the DTV Act did not specify which frequencies within the Upper 700 MHz band must be allocated to public safety and commercial use, nor did it specify the frequencies within the 698 – 806 MHz band that must be auctioned according to the timeline specified in the Act (opting, instead, to exempt certain categories of spectrum rather than specific frequency blocks from the auction timeline).

The DTV Act established the license assignment deadlines for Upper 700 MHz spectrum allocated to commercial use under section 337 (as well as recovered spectrum in the Lower 700 MHz band). Specifically, the DTV Act modified section 309(j) to require the FCC to commence an auction of the licenses for “recovered analog spectrum” by January 28, 2008.<sup>7</sup> The statute defines “recovered analog spectrum” as

- spectrum between channels 52 and 69, inclusive (between frequencies 698 and 806 megahertz, inclusive) reclaimed from analog television service broadcasting . . . other than
- (I) the spectrum required by section 337 to be made available for public safety services; and
  - (II) the spectrum auctioned prior to the date of enactment of the Digital Television Transition and Public Safety Act of 2005.<sup>8</sup>

Six MHz of Upper 700 MHz commercial spectrum is excluded from the definition of “recovered analog spectrum” because the Upper 700 MHz A and B Blocks were auctioned prior to enactment of the DTV Act (in partial fulfillment of Section 337’s requirement that 36 MHz be assigned by competitive bidding).<sup>9</sup> Only 30 MHz of Section 337’s 36 MHz commercial use allocation remains to be auctioned in order to fulfill the obligations of the DTV Act.<sup>10</sup>

Section 337 directs the FCC in the allocation and assignment of public safety and commercial licenses in the 700 MHz band. Even as modified by the DTV Act, it does

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<sup>7</sup> DTV Act § 3003(a)(2), codified at 47 U.S.C. §309(j)

<sup>8</sup> 47 U.S.C. § 309(j)(15)(C)(vi). The DTV Act was enacted on February 8, 2006.

<sup>9</sup> “700 MHz Guard Bands Auction Closes; Winning Bidders Announced,” Public Notice, 15 FCC Rcd 18026 (Sept. 25, 2000) (DA 00-2154).

<sup>10</sup> As explained below, Section 337 addresses the allocation and assignment only of the Upper 700 MHz frequencies, not the Lower 700 MHz frequencies. However, the DTV Act’s amendment of Section 309(j) requires the Commission to auction the Lower 700 MHz frequencies that had not been auctioned prior to enactment of the DTV Act. See DTV Act § 3003(a)(2), codified at 47 U.S.C. §§ 309(j)(15)(C)(v) and (vi).

not specify the particular frequencies within the band to which the different services must be assigned. Rather, it identifies the spectrum band from 746 MHz to 806 MHz and simply requires the FCC to allocate 36 MHz of that spectrum to commercial use for assignment by competitive bidding and 24 MHz of that spectrum to public safety use.<sup>11</sup> The specification of frequencies within the 746 – 806 MHz band for allocation to public safety use and commercial use is left to the Commission's discretion. As stated above, the passage of the DTV Act did not restrict the Commission's discretion as to choice of frequencies; it simply requires that 30 MHz of spectrum in the Upper 700 MHz band (as well as 30 MHz in the Lower 700 MHz band) be auctioned, and the proceeds deposited by specified dates.

#### **B. Allocating the Upper 700 MHz B Block to Public Safety Use**

Once the requirements of the DTV Act and Section 337 are discharged, the statute does not otherwise limit the Commission's full exercise of its normal spectrum management authority over the 700 MHz band, including the power to designate this spectrum (even previously auctioned commercial use spectrum) for public safety use.<sup>12</sup> The Commission has fully satisfied its obligations under Section 337 with respect to the Upper 700 MHz B Block. In particular, the Commission has: (1) reallocated 36 MHz of the Upper 700 MHz band, including the 6 MHz of the A and B Blocks, in a manner that made this spectrum available for "commercial use;"<sup>13</sup> and (2) completed an auction of the A and B Block spectrum.<sup>14</sup> Neither the express language of Section 337 nor its legislative history contains any indication that Congress intended to abridge the Commission's discretion to manage the spectrum at 746-806 MHz.<sup>15</sup> Section 337 must be interpreted in a manner that is consistent with the other sections of the Communications Act, including sections that grant the Commission broad authority to manage spectrum. Consequently, because it already has discharged its obligation under Section 337 to allocate the Upper 700 MHz B Block spectrum to commercial use and to assign it by competitive bidding, the FCC may revert to its broader statutory spectrum management authority to re-allocate the B Block to public safety use.

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<sup>11</sup> 47 U.S.C. §337(a).

<sup>12</sup> Courts appropriately offer the Commission wide latitude in spectrum allocation and band configuration decisions. *See, e.g., Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 444-445 (D.C. Cir. 1991); *Teledesic LLC v. FCC*, 275 F.3d at 84.

<sup>13</sup> *See Reallocation of Television Channels 60-69, the 746-806 MHz Band*, Report and Order, 12 FCC Rcd 22953, ¶ 17 (1998).

<sup>14</sup> "700 MHz Guard Bands Auction Closes; Winning Bidders Announced," Public Notice, 15 FCC Rcd 18026 (Sept. 25, 2000) (DA 00-2154).

<sup>15</sup> *See* Balanced Budget Act of 1997, Conference Report, H. Conf. Rep. 105-217 (July 30, 1997); Balanced Budget Act of 1997, Report of the Committee on the Budget, H.R. Rep. No. 105-149 (June 24, 1997).

The Commission previously noted that “there are several potential public safety and public interest benefits that may be realized by a redesignation or reassignment of the 700 MHz Guard Band spectrum that Nextel offers to relinquish.”<sup>16</sup> Indeed, managing the spectrum in a manner that promotes the safety of life and property is one of the Commission’s prime statutory directives.<sup>17</sup> The Commission previously implemented that directive by re-designating commercial spectrum to public safety use in its *800 MHz Rebanding Order*,<sup>18</sup> a decision that withstood judicial scrutiny.<sup>19</sup> Similar public policy considerations and the exercise of the same statutory authority support allocation of the Upper 700 MHz B Block to public safety use consistent with the Broadband Optimization Plan.

## **II. Authority to Use Certain Techniques for Assignment**

After determining the appropriate band plan, the Commission must also consider mechanisms for assigning licenses. By employing two-sided auctions, bidding credits and bidding preferences in its assignment efforts, the Commission can promote the most effective use of the spectrum. This section discusses the Commission’s authority to use a variety of techniques in managing the spectrum for the public good.

### **A. Two-Sided Auctions**

Because some spectrum in the Lower and Upper 700 MHz band has already been auctioned, in the *Commercial 700 MHz NPRM*, the FCC sought comment on techniques for removing transactional barriers that might prevent the spectrum from being put to its

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<sup>16</sup> *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels; Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems; Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service; Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service; Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, 19 FCC Rcd 14969, ¶ 209 (2004) (“*800 MHz Rebanding Order*”).

<sup>17</sup> *See id.* ¶ 62; *see also id.* ¶ 82 (“[T]he Commission is *required* under Sections 1 and 303 of the Act to use its spectrum assignment powers to promote public safety.”(emphasis in original)).

<sup>18</sup> *Id.* ¶¶ 142, 151.

<sup>19</sup> *Mobile Relay Assocs. v. FCC*, 457 F.3d 1 (D.C. Cir. 2006).

best and highest use. Specifically, the Commission sought comment on the use of “two-sided auctions.”<sup>20</sup> The Commission has used the term “two-sided auction” to refer to an “auction of licenses that makes available rights to previously unassigned spectrum, held by the Commission, and rights to spectrum previously licensed.”<sup>21</sup> In the *Commercial 700 MHz NPRM*, the Commission described several methods of implementing a two-sided auction. For example, the Commission could allow existing licensees to offer their licenses in the auction, but relinquish the licenses only if the prices reached a certain level.<sup>22</sup> Alternatively, the *Commercial 700 MHz NPRM* suggests that the Commission could permit “incumbent licensees to return their licenses in exchange for a credit, which could be based on the prices of licenses for spectrum formerly associated with the returned licenses as determined in an auction.”<sup>23</sup>

As described in the Access Spectrum/Pegasus comments, implementing the Commercial 700 MHz Plan may involve the use of a two-sided auction, implemented either by allowing current licensees to offer their licenses, or to return them for a bidding credit.<sup>24</sup> As it already has recognized in the context of its rulemakings addressing the reconfiguration of the MDS bands, the FCC possesses the statutory authority to conduct a two-sided auction. In the *MDS NPRM*, the Commission stated that:

To the extent a restructuring auction offers new initial licenses to all interested parties, we conclude that we can conduct such an auction consistent with our mandate and authority under Section 309(j). To the extent that our auction process provides private parties with a secondary

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<sup>20</sup> *Commercial 700 MHz NPRM* ¶¶ 56-59.

<sup>21</sup> *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission's Rules – Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Fixed Service for the Gulf of Mexico*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 18 FCC Rcd 6722, ¶ 232 (2003) (“*MDS NPRM*”).

<sup>22</sup> *Commercial 700 MHz NPRM* ¶ 58.

<sup>23</sup> *Id.*

<sup>24</sup> Comments of Access Spectrum, LLC, Columbia Capital II, LLC, Pegasus Communications Corporation and Telcom Ventures, LLC, WT Docket Nos. 06-150 and 01-309 and CC Docket No. 94-102, at 29-31 (Sept. 29, 2006) (“*Access Spectrum/Pegasus Commercial 700 MHz Comments*”).

market for existing licenses that enhances the final license assignment in a simultaneous auction of new licenses, we believe that we can design such an auction consistent with our mandate and authority under Sections 1, 4(i) and 303(r) of the Communications Act.<sup>25</sup>

Indeed, the courts indirectly have confirmed that view by affording deference to the Commission on the manner in which it chooses to assign spectrum licenses.<sup>26</sup> The Commission has also engaged in a thorough analysis to conclude that Sections 4(i), 303, and 309(j) of the Communications Act provide it with the authority to employ bidding offset credits in conjunction with two-sided auctions.<sup>27</sup> Access Spectrum and Pegasus agree with the Commission's assessment of its statutory authority.

## **B. Bidding Preferences**

As noted above, the Commission has broad authority to manage spectrum and, in particular, has a mandate to manage spectrum to advance public safety. Even with spectrum allocated for public safety broadband operators, public safety agencies still would confront two primary challenges: (1) the high cost of building and maintaining networks; and (2) the need for the public safety community to gain additional capacity during emergencies. The Commercial 700 MHz Plan addresses these challenges by proposing a public safety partner bidding preference.<sup>28</sup> The bidding preference would be given to the buyer of the commercial spectrum adjacent to the public safety broadband channels in return for a commitment to share infrastructure, provide priority access to the commercial networks for public safety agencies, and provide virtual private networking capabilities for each public safety agency at the option of the public safety agency.

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<sup>25</sup> MDS NPRM ¶ 242 (citations omitted).

<sup>26</sup> See, e.g., *Fresno Mobile Radio v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999) (affording *Chevron* deference to the FCC in determining whether a new licensing scheme creates an "initial" license, allowing the use of competitive bidding); see also *Rainbow Broadcasting v. FCC*, 949 F.2d 405, 410 (D.C. Cir. 1991) (upholding FCC's authority to allow licensees to exchange channels without exposing the licenses to competing applications); *Benkelman Tel. Co. v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000) (dominant factor in FCC's choice of licensing scheme is the public interest).

<sup>27</sup> *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, ¶¶ 303-304 (2004).

<sup>28</sup> *Access Spectrum/Pegasus Commercial 700 MHz Comments* at 35-43.

The Commission possesses ample authority to further augment public safety benefits by issuing public safety partner bidding preferences. Promoting public safety through the use of radio communication is one of the core purposes underlying the Communications Act<sup>29</sup> and one of the objectives the Commission must advance in designing spectrum auctions.<sup>30</sup> These directives, combined with the Commission's broad authority over auctions and spectrum management,<sup>31</sup> permit the issuance of public safety partner bidding preferences in the 700 MHz auction.

The statute specifically includes bidding preferences as a mechanism that the Commission may employ to further the objectives in Section 309(j)(3).<sup>32</sup> Although the statute lists small businesses, rural telephone companies, and businesses owned by members of minority groups and women as those who may be awarded bidding preferences,<sup>33</sup> the Commission has concluded that "[t]here is no indication in Section 309(j)(4)(D) or in its legislative history . . . that the Commission's authority to award bidding preferences is limited to such entities."<sup>34</sup> To the contrary, "Congress intended that Section 309(j)(4) would provide the Commission 'flexibility to utilize any combination of techniques that would serve the public interest.'"<sup>35</sup> Indeed, the Commission has exercised its authority to issue bidding preferences to entities other than those enumerated in the statute.<sup>36</sup> The public interest benefits of a public safety partner bidding preference outlined by Access Spectrum and Pegasus warrant the Commission's similar use of its authority in the 700 MHz auction.<sup>37</sup>

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<sup>29</sup> 47 U.S.C. § 151.

<sup>30</sup> See 47 U.S.C. §309(j)(3) (requiring the Commission to "promote the purposes specified in section 1 of this Act [47 U.S.C. § 151]" in designing competitive bidding systems).

<sup>31</sup> See 47 U.S.C. §§ 303, 309(j).

<sup>32</sup> 47 U.S.C. § 309(j)(4)(D).

<sup>33</sup> *Id.*

<sup>34</sup> *Extending Wireless Telecommunications Services to Tribal Lands*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 11794, ¶ 19 (2000).

<sup>35</sup> *Id.* (quoting H.R. Rep. No. 111, 103rd Cong., 1st Sess. 1993, at 255).

<sup>36</sup> See 47 C.F.R. § 1.2110(f)(3) (bidding credit for those deploying facilities to serve qualifying tribal lands).

<sup>37</sup> In other contexts, the Commission has refused to issue public safety bidding preferences. See, e.g., *Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands*, Report and Order, 17 FCC Rcd 9980 (2002). However, in those contexts, the public safety advantages to be obtained also could have been derived by assigning the spectrum in question exclusively to public safety use. By contrast, in this instance, the



For the foregoing reasons, the Commission may proceed with adoption of the Broadband Optimization Plan and Commercial 700 MHz Plan as proposed by Access Spectrum and Pegasus with the certainty that it is operating well within the limits of its statutory authority.

Sincerely,

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expense of broadband network construction and maintenance as well as the absence of scale economies for equipment would make it impossible for public safety to realize these benefits without commercial support. In sum, if the broadband capabilities and public interest benefits are to be realized, it necessarily must occur through a private-public mechanism such as the one proposed by Access Spectrum and Pegasus.